IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5038 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA **Sd/-**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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V.R. MAKWANA - Petitioner(s)

Versus

STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :
M/S THAKKAR ASSOC. for Petitioner(s) : 1,
MS RITA CHHANDARANA, Ld. AGP for Respondent(s) : 1 - 2.
MS MAMTA R VYAS for Respondent(s) : 3,
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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 27/01/2006

ORAL JUDGMENT

1. This petition under Article 226 of the Constitution is filed with the prayers “to set aside the action of the respondent authority in not giving the benefit of pension to the petitioner on attaining the age of superannuation with interest at the rate of 18% in the interest of justice” and “to direct the respondent

authority to start paying pension due to the petitioner forthwith, pending admission, hearing and final disposal of this petition".

2. The petitioner claims to have been working as octroi watchman under respondent No.3- Kalol Nagar Palika since 18.6.1982, on the post which was sanctioned by the Government on 5.3.1999. On 12.2.2004, the petitioner completed the age of 60 years and retired upon reaching the age of superannuation. Thereafter, the petitioner repeatedly requested respondent No.3 to pay pension, gratuity and other benefits to which he was entitled.

3. By filing an affidavit-in-reply on behalf of respondent No.3, it is stated, inter alia, that the petitioner was appointed in the year 1982 without following due procedure, purely for part-time on temporary basis and the post was not regularized. It is also stated that he was not appointed through proper channel and he was not entitled to the benefits which are prayed for. It is also stated that there are no rules and regulations for payment of pension and gratuity as far as Kalol Municipal Borough is concerned. In absence of any rules and approval from the State Government in respect of payment of pension and gratuity, respondent No.3 could not pay the pension. As for the claim of gratuity, it is stated that the petitioner has already approached the Controlling Authority under the provisions of the Payment of Gratuity Act, 1972.

4. By filing affidavits-in-rejoinder and relying on

them, it was submitted by learned counsel Ms. Sangita Pahwa, appearing for the petitioner, that the petitioner was a regular employee of respondent No.3, who had on 11.11.1998 passed a resolution to send for approval to the Director of Municipalities the rules for pension to its employees. However, it appeared that the respondent nagar palika had not sent the rules for approval. Relying upon the order of this Court in Special Civil Application No. 5189 of 1995, it was submitted that respondent No.3 was, at present, giving family pension to the petitioner concerned in that petition.

5. It appears from the memorandum dated 5.3.1999 of the State Government in its Panchayat, Rural Housing and Rural Development Department (at Annexure-'A' to the petition) that the set up of respondent No.3 was approved with retrospective effect and it was clarified that the employees of respondent No.3 were required to be paid wages according to the decision of that municipal borough and the entire expenditure of the establishment, either under the Gujarat Panchayats Act, 1961 or the Gujarat Panchayats Act, 1993, was to be borne out of its own fund and that expenditure was not to exceed 45%, as required by the resolution dated 14.9.1993 of the State Government. It was further stated that the Kalol Nagar Panchayat was converted into a municipal borough with effect from 16.10.1996 and, therefore, the entire expenses of the establishment were to be borne by the municipal borough in accordance with the provisions of the Gujarat Municipalities Act, 1963 and the rules made thereunder.

6. It is clear from the above factual and legal position that the service of the petitioner was admittedly regularized as late as in the year 1999 and the rules for payment of pension, if any, were not approved. Even if any rules were framed by respondent No.3, a copy thereof is not placed on record despite the pendency of the petition for two years.

7. In these facts, a bald statement and bold argument for the petitioner was only that the petitioner was a panchayat servant, that panchayat servants are Government servants and that, therefore, they are entitled to pension. The learned counsel referred to The Gujarat Panchayat Service (Pension) Rules, 1999 in which the panchayat servant is defined and no mention is made as to how the petitioner was belonging to either the superior panchayat service or the inferior panchayat service. The learned counsel also referred to The Gujarat Panchayat Service (Pension) Rules, 1976 in which also, the same lack of averment and application of mind was apparent. Therefore, the petitioner had to fall back upon the judgment of this Court dated 18.11.1995 in Special Civil Application No. 5189 of 1995, in which an octroi clerk appointed on 19.4.1981 had died in harness on 24.12.1994 and his widow was ordered to be paid family pension under the scheme which was applicable to all Government servants on the basis that the clerk serving in panchayat was held to be a Government servant in Mankuvarba Manaharsinh Vaghela Vs. Tharad Nagar Panchayat and Another reported in 1992(1) G.L.R. 375. In the facts of that case, the learned counsel for the respondents

were called upon to show the basis on which the petitioner could be denied the benefits of the Family Pension Scheme, but except making a bald statement that the deceased husband of the petitioner was only a part-time octroi nakedar, nothing was pointed out and that contention stood fully controverted. Therefore, the Court found no basis to deny or deprive the petitioner of the benefit of family pension and accordingly directed the payment of family pension from the date of expiry of her husband.

8. Obviously, the judgment in the aforesaid Special Civil Application No. 5189 of 1995 was rendered in absence of any objection to the basis of the claim and on the assumption that the family pension scheme applicable to all the Government servants was applicable to all the panchayat servants and the only controversy, which was even re-agitated in Letters Patent Appeal No. 18 of 1996 preferred from the aforesaid judgment, was with regard to the status of the deceased employee as a part-time employee. As against that, in the facts of the present case, the liability of the respondents to pay pension is disputed and by the memorandum at Annexure-'A' annexed by the petitioner himself, it is clear that the expenditure on establish of respondent No.3 is to be borne by it in accordance with the provisions of the Gujarat Municipalities Act, 1963 and the rules made thereunder. Therefore, in absence of any rules having the force of law, respondent No.3 cannot be saddled with the liability of payment of pension particularly when it has serious financial implications as stated in the affidavit-in-

reply.

9. Therefore, in the facts and for the reasons discussed hereinabove, the petitioner having failed to make out any legal basis for the claim and the amount of gratuity having already been claimed in appropriate alternative proceeding, the petition is dismissed and Rule is discharged with no order as to costs.

Sd/-

(D.H. WAGHELA, J.)

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